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Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:

- ☐ All Debtors
- ☐ USA Commercial Mortgage Company
- ☐ USA Securities, LLC
- ☐ USA Capital Realty Advisors, LLC
- ☒ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA First Trust Deed Fund, LLC

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

Chapter 11

Jointly Administered Under
 Case No. BK-S-06-10725-LBR

THIRD OMNIBUS OBJECTION OF POST-EFFECTIVE DATE USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, TO PROOFS OF INTEREST

Hearing Date: July 27, 2007
 Hearing Time: 9:30 a.m.
 Hearing Place: Courtroom 1

Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC ("Diversified"), a
 revested debtor in the above-captioned cases, by and through its counsel noted above, hereby
 submits this Third Omnibus Objection of Post-Effective Date USA Capital Diversified Trust
 Deed Fund, LLC To Proofs of Interest (the "Objection"),¹ pursuant to which Diversified objects

¹ Due to the number of proofs of interest involved, this Objection is one of three objections to proofs of interest all filed substantially contemporaneously which, when taken together, will assert objections to an aggregate total of fifty-five (55) proofs of interest filed in the Diversified chapter 11 case.

1 to the proofs of interest described herein and as listed on **Exhibit 1** (the “Subject Interests”),
2 attached hereto and made a part hereof, on the grounds that they (i) do not assert the correct
3 amount of the equity interests held in Diversified as of the Petition Date (defined below) by the
4 parties who filed the Subject Interests (the “Parties”), or (ii) were filed by Parties who are not
5 shown in Diversified’s books and records as having an equity interest in Diversified as of the
6 Petition Date. By this Objection, Diversified requests that the Subject Interests be disallowed (i)
7 to the extent they assert amounts that are different from each respective Party’s equity interest in
8 Diversified as of the Petition Date as reflected in Diversified’s books and records and allowed in
9 the amount of each Party’s equity interest in Diversified as of the Petition Date per Diversified’s
10 books and records, or (ii) in their entirety to the extent they were filed by Parties not shown in
11 Diversified’s books and records as having an equity interest in Diversified as of the Petition
12 Date and for which no satisfactory evidence of such equity interest for each respective Party is
13 demonstrated. By this Objection, Diversified does not seek to prejudice the rights of any
14 Diversified Member (as defined herein) who filed a Subject Interest to recover from Diversified
15 on account of his or her membership interest in Diversified. A detailed list of the Subject
16 Interests and the relief sought with respect to each Subject Interest is set forth on Exhibit 1
17 attached hereto.

18 The Objection is made pursuant to Section 502 of chapter 11 of Title 11 of the United
19 States Code (the “Bankruptcy Code”), Rule 3007 of the Federal Rules of Bankruptcy Procedure
20 (the “Bankruptcy Rules”), Rule 3007 of the Local Rules of Bankruptcy Practice (the “Local
21 Rules”), the points and authorities contained herein, the declaration of Chas Harvick (the
22 “Harvick Declaration”), filed concurrently herewith and in support hereof, the pleadings and
23 papers on file with the Court in the above-captioned cases, as referenced by docket number,
24 judicial notice of which is respectfully requested, and any oral argument of counsel the Court
25 may wish to entertain at the hearing on this matter.

26 WHEREFORE, for all of the reasons set forth herein, Diversified respectfully requests
27 that the Court enter an order (i) sustaining the Objection; (ii) disallowing the Subject Interests to
28 the extent they assert amounts that are different from each respective Party’s equity interest in

Diversified as of the Petition Date as reflected in Diversified's books and records and allowed in the amount of each Party's equity interest in Diversified as of the Petition Date per Diversified's books and records, (iii) disallowing the Subject Interests in their entirety to the extent they were filed by Parties not shown in Diversified's books and records as having an equity interest in Diversified as of the Petition Date and for which no satisfactory evidence of such equity interest for each respective Party is demonstrated, and (iv) granting such other and further relief as the Court may deem just and proper.

DATED this 8th day of June 2007.

BECKLEY SINGLETON, CHTD.

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POINTS AND AUTHORITIES

I.

JURISDICTION

1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

2. The statutory predicate for the relief requested herein are 11 U.S.C. § 502 and Bankruptcy Rule 3007.

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II.

STATEMENT OF FACTS

A. Procedural Background Information.

3. On April 13, 2006 (the "Petition Date"), USA Commercial Mortgage Company ("USACM"), USA Securities, LLC ("USA Securities"), USA Capital Realty Advisors, LLC ("USA Realty"), USA First Trust Deed Fund, LLC ("FTDF"), and the Diversified Fund (collectively with USACM, USA Securities, USA Realty, and the FTDF, the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors continued to operate their businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Post-petition management of the Debtors was under the direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC ("Mesirow"), who served as the Chief Restructuring Officer.

4. On May 4, 2006, the Court entered its Amended Order Approving Debtor's Ex Parte Application for Order Approving Employment of BMC Group, Inc. as the Claims Agent for Debtor's Estate [Docket No. 149] authorizing BMC Group, Inc. ("BMC") to serve as the Court's notice agent and to act as the claims agent for the Debtors.

5. On May 9, 2006, the Court entered its Order Regarding Joint Administration Without Substantive Consolidation [Docket No. 184] linking the Chapter 11 Cases for joint administration under the USACM case name and number, BK-S-06-10725-LBR.

6. On June 15, 2006, pursuant to Bankruptcy Code Section 521(a)(1)(B), each of the Debtors filed their "Summary of Schedules and Statement of Financial Affairs" (collectively, the "Schedules") based upon their books and records as of the Petition Date.

7. On September 14, 2006, the Court entered its Order Setting Deadline to File Proofs of Claim and Proofs of Interest [Docket No. 1280] setting the deadline of November 13, 2006 ("Bar Date"), to file proofs of claim in the Chapter 11 Cases.

8. On September 15, 2006, the Court approved the Stipulated Order re Proofs of Interest [Docket No. 1293], in which the Debtors, the duly appointed Official Committee of Equity Security Holders of USA Capital Diversified Trust Deed Fund, LLC (the "Diversified

Committee”), and the duly appointed Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund, LLC (the “FTDF Committee”) stipulated that (1) the list of members with interests in Diversified and USA Capital First Trust Deed Fund, LLC (“FTDF”) provided by the Debtors to BMC shall be deemed the list of equity security holders filed pursuant to Bankruptcy Rule 1007(a)(3) and shall constitute *prima facie* evidence of the validity and amount of equity security interests in Diversified and FTDF; (2) each holder of such interests shall be given notice of the Debtor in which it has an interest, and, if applicable, whether that interest is alleged to be contingent or disputed; (3) it shall not be necessary for the holders of such interests to file a proof of interest; and (4) the holders of such interests shall be deemed to have filed a proof of interest in the amount shown on the lists provided by the Debtors.

9. On or around September 18, 2006, BMC mailed proof of claim and proof of interest forms, together with instructions explaining that (i) if any equity interest holder (such as a Diversified Member) wished to assert a claim (as opposed to an equity interest) against any of the Debtors, then that equity holder must file a proof of claim but that proofs of claim should only be filed in those instances where the claimant believed one of the Debtors owed the claimant monies for such things as damages, rescission, reimbursement or contribution; and (ii) if the equity interest holder had no disagreement with the amount indicated on the proof of interest form included in the mailing, then that equity interest holder need take no action and his proof of interest in the Diversified Fund would be deemed allowed in the amount shown on the proof of interest form.

10. On November 16, 2006, Debtors filed the Debtors Third Amended Joint Chapter 11 Plan of Reorganization (the “Plan”).

11. On December 20, 2006, the Court orally confirmed the Plan and on January 8, 2007, the Court entered an order confirming the Plan [Docket No. 2376].

B. The Debtors’ Businesses.

12. As of the Petition Date, USACM acted as the servicer for 115 separate loans (the “Loans”) having a combined outstanding loan balance of approximately \$962 million. *See*

1 Supplemental Declaration of Thomas J. Allison in support of Debtors' Motions [Docket No.
2 130], ¶ 2. All but three of the Loans were to have been secured by a deed of trust recorded
3 against commercial real property. *Id.*, at ¶ 3.

4 13. According to the Debtors, there are an estimated 3,600 investors (the "Direct
5 Lenders") whose names appear as lenders in the documents for one or more of the Loans. *Id.*,
6 at ¶ 5. Diversified (together with FTDF, the "Fund Lenders") is one such Direct Lender.

7 **C. Diversified and Its Holdings.**

8 14. Diversified was formed in 2000 for the sole purpose of investing in non-insider
9 loans secured by first position deeds of trust on real property.

10 15. As of the Petition Date, Diversified had an interest as a Direct Lender in 23 of
11 the Loans (the "Diversified Fund Loans"). In the Diversified Fund Loans, Diversified was the
12 sole Direct Lender in 7 and held only a fractional interest in the remaining 16 Loans.

13 16. Diversified is owned by approximately 1,344 Diversified Members who
14 purchased membership interests in the Diversified corporate entity. It bears emphasizing that it
15 is Diversified as a corporate entity, and not the Diversified Members, that is a Direct Lender on
16 the Diversified Fund Loans. Likewise, it is Diversified's investments, and not those of the
17 Diversified Members, that are secured – or should have been secured – by deeds of trust. The
18 Diversified Members are only entitled to receive distributions from Diversified to the extent
19 Diversified has profits remaining after all of its expenses and valid claims have been paid.
20 Thus, the Diversified Members own Diversified, not Diversified's investments, by virtue of
21 their equity security interests.

22 **D. Analysis of Proofs of Interest Filed in the Diversified Case.**

23 17. As of the filing of this Objection, 195 proofs of interest had been filed in the
24 Diversified case.

25 18. Diversified has analyzed all of the proofs of interest filed in the Diversified case
26 and has determined that most assert an amount that corresponds with the amount of the equity
27 interest held in Diversified by the respective Party as of the Petition Date, as reflected in the
28 Debtor's books and records. However, 35 of the proofs of interest filed in the Diversified case

1 assert equity interests in Diversified that do not correspond to the amount of the equity interest
 2 held in Diversified by the respective Party as of the Petition Date, as reflected in the Debtors'
 3 books and records. Fourteen of the Subject Interests are interests with such differing amounts
 4 (the "Differing Interests"). A detailed listing of the Differing Interests is included in Exhibit 1
 5 attached hereto and incorporated for all purposes herein by this reference. In summary,
 6 Diversified has no liability for any of the Differing Interests to the extent the amounts asserted
 7 by each Differing Interest exceed the amount of the filing Party's equity interest in Diversified
 8 as of the Petition Date as reflected in Diversified's books and records. Accordingly, the
 9 Differing Interests should be disallowed in whole or in part as set forth in Exhibit 1.

10 19. One of the proofs of interest filed in the Diversified case was filed by the
 11 Loughlin Family Trust, who is not shown in Diversified's books and records as having an
 12 equity interest in Diversified as of the Petition Date. Such proof of interest (the "Non-Member
 13 Interest") is detailed in Exhibit 1 attached hereto and incorporated for all purposes herein by
 14 this reference. In summary, Diversified has no liability for the Non-Member Interest, and it
 15 should be disallowed in its entirety.

16 II.

17 ARGUMENT

18 A. Interests Should Be Allowed Only in the Amounts Set Forth in the Debtors' Books 19 and Records.

20 Bankruptcy Code Section 502 authorizes a party in interest to object to claims or
 21 interests. *See* 11 U.S.C. §502(a). Upon such objection, this Court, "after notice and a hearing,
 22 shall determine the amount of such claim in lawful currency of the United States as of the date
 23 of the filing of the petition" 11 U.S.C. § 502(b). Although a proper proof of claim or
 24 interest is presumed valid under Bankruptcy Rule 3001(f), once an objection controverts the
 25 presumption, the holder of the claim or interest has the ultimate burden of persuasion as to the
 26 validity and amount of the claim. *Ashford v. Consolidated Pioneer Mortg. (In re Consolidated*
 27 *Pioneer Mortg.)*, 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996)
 28 (quoting *In re Allegheny International, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992)).

1 The Bankruptcy Appellate Panel for the Ninth Circuit explained the shifting burdens of
2 proof with respect to objection to proofs of claim as follows:

3 The burden of proof for claims brought in the bankruptcy court under 11
4 U.S.C.A. § 502(a) rests on different parties at different times. *Initially, the*
5 *claimant must allege facts sufficient to support the claim. If the averments*
6 *in his filed claim meet this standard of sufficiency, it is “prima facie”*
7 *valid. In other words, a claim that alleges facts sufficient to support a*
legal liability to the claimant satisfies the claimant’s initial obligation to
go forward. . . . The burden of persuasion is always on the claimant.

8 *Id.* (emphasis added). Following this decision, the District Court for the Northern District of
9 California emphasized, “unless the claimant has alleged ‘facts sufficient to support a legal
10 liability, ‘the claim is not prima facie valid.’ *In re Hongnisto*, 293 B.R. 45, 50 (N.D. Cal. 2003)
11 (quoting *Consolidated Pioneer Mortg.*, 178 B.R. at 266) (holding that the claimant’s proof of
12 claim failed to allege sufficient facts to support a legal liability and consequently disallowed the
13 proof of claim); *see Consolidated Pioneer Mortg.*, 178 B.R. at 227 (holding that because the
14 proof of claim did not allege sufficient facts to support the claim, the proof of claim was
15 disallowed). As Bankruptcy Code Section 502(a) refers to both claims and interests, the burden
16 shifting analysis described above applies to proofs of interest as well as to proofs of claim. *See*
17 11 U.S.C. § 502(a) (“A claim or interest, proof of which is filed under section 501 of this title,
18 is deemed allowed, unless a party in interest . . . objects.”).

19 Moreover, it is a fundamental tenet of bankruptcy law that only those holders of
20 claims against or interests in a debtor should recover from the assets of that debtor.
21 Bankruptcy Code Section 502(b)(1) provides that a bankruptcy court shall not allow a claim
22 that “is unenforceable against the debtor and property of the debtor, under any agreement or
23 applicable law for a reason other than because such claim is contingent or unmatured.” 11
24 U.S.C. § 502(b)(1). Thus, Section 502 precludes the allowance of any proof of interest filed by
25 parties who are not equity interest holders in a particular debtor. *Id.* Diversified’s books and
26 records do not indicate the Loughlin Family Trust, the Party that filed the Non-Member
27 Interest, as having any equity interest in Diversified as of the Petition Date. Therefore, the
28 Non-Member Interest should be disallowed in its entirety.

III.**NOTICE**

This Objection will be served on (i) all of the parties who filed the Subject Interests at the addresses set forth on the parties' respective proofs of interest, (ii) all parties on the Post Effective [Date] [sic] Official Service List for Limited Notice No. 2 dated June 1, 2007 [Docket No. 3874] and (iii) all parties who have filed requests for special notice since the filing of such master service list. In light of the nature of the relief requested, Diversified submits that no further notice need be given.

IV.**CONCLUSION**

WHEREFORE, for all of the reasons set forth herein, Diversified respectfully requests that the Court enter an order (i) sustaining the Objection; (ii) disallowing the Differing Interests to the extent they assert amounts that are different from each respective Party's equity interest in Diversified as of the Petition Date as reflected in Diversified's books and records and allowed in the amount of each Party's equity interest in Diversified as of the Petition Date per Diversified's books and records, (iii) disallowing the Non-Member Interest in its entirety to the extent it was filed by a Party not shown in Diversified's books and records as having an equity interest in Diversified as of the Petition Date and for which no satisfactory evidence of such equity interest

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1 for each respective Party is demonstrated, and (iv) granting such other and further relief as the
2 Court may deem just and proper.

3 DATED this 8th day of June 2007.

4 **BECKLEY SINGLETON, CHTD.**

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16 *Attorneys for Post-Effective Date USA Capital*
17 *Diversified Trust Deed Fund, LLC*
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EXHIBIT 1

Proofs of Interest Subject to Objection

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
005	Robert Knight	951	09/25/06	\$135,938.86	\$130,629.97	Disallow interest to the extent it exceeds \$130,629.97, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
192	David Knobel	13505	12/11/06	\$78,367.29	\$75,306.77	Disallow interest to the extent it exceeds \$75,306.77, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
189	William McQuerry	16027/ 18671	12/06/06	\$655,584.00	\$96,094.64	Disallow interest to the extent it exceeds \$96,094.64, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
180	Anthony and Alicia Pasqualotto	2079	11/15/06	\$25,000.00	\$24,023.66	Disallow interest to the extent it exceeds \$24,023.66, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
115	Norman Kenneth Reed	13762	11/09/06	\$49,027.18	\$48,047.32	Disallow interest to the extent it exceeds \$48,047.32, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
190	Michael H. Ricci	18138	12/08/06	\$100,000.00	\$96,094.65	Disallow interest to the extent it exceeds \$96,094.65, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
191	Michael H. Ricci	11384	12/08/06	\$36,058.88	\$34,650.65	Disallow interest to the extent it exceeds \$34,650.65, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
080	Alvin Rousseau	4638	10/26/06	\$24,708.00	\$24,023.66	Disallow interest to the extent it exceeds \$24,023.66, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
018	Robert and/or Ruth Geiger	17071	11/10/06	\$50,000.00	\$26,461.76	Disallow interest to the extent it exceeds \$26,461.76, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
033	Lucie E. Staislawski	17016	09/28/06	\$25,000.00	\$24,023.66	Disallow interest to the extent it exceeds \$24,023.66, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
037	Clifford Wiehe, Jr.	9653	10/04/06	\$150,000.00	\$144,141.97	Disallow interest to the extent it exceeds \$144,141.97, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
043	William T. Houston	11127	09/26/06	\$50,000.00	\$48,047.32	Disallow interest to the extent it exceeds \$48,047.32, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
157	Stan C. Wolken	18171	11/13/06	\$25,116.41	\$24,135.53	Disallow interest to the extent it exceeds \$24,135.53, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
150	Stan C. Wolken	16527	11/13/06	\$25,937.73	\$24,924.77	Disallow interest to the extent it exceeds \$24,924.77, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
188	Loughlin Family Trust	No Record	11/7/06	\$1,055,000.00	None	Disallow interest in its entirety, as Party is not reflected as having an equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.